Supreme Court, U.S.
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No. 91-1541

In The

Supreme Court of the United States

October Term, 1991

JOHN W. EWING, et al.,

Petitioners,

v.

CITY OF CARMEL-BY-THE-SEA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California Sixth Appellate District

AMICI CURIAE CALIFORNIA CITIES IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici curiae are 43 cities throughout the State of California who participated in the challenged Court of Appeal case. The parties have consented to the submission of this brief pursuant to Supreme Court Rule 37.2.

California cities are authorized under the State Constitution to regulate land use by creating districts within the municipality for specified uses. A city's zoning ordinance establishes permissible and impermissible uses for each district. Commercial uses are commonly restricted in residential districts to protect the residential character of the city's neighborhoods.

Municipal zoning authority has been repeatedly upheld by this Court, so long as it is rationally related to its stated purpose and does not work an unconstitutional taking. Petitioners seek to undermine the traditional deference shown to exercises of the zoning power. Their so-called takings claim masks Petitioners' dissatisfaction with the line drawn by Carmel between commercial and residential areas. The granting of the writ of certiorari would invite federal takings challenges to every municipal zoning regulation delineating permissible and impermissible uses in every zoning district. Amici therefore respectfully ask this Court to deny the writ.

STATEMENT OF THE CASE

Zoning Ordinance No. 89-17 ("Ordinance") was enacted to preserve the residential character of Carmel's neighborhoods by creating an area for permanent single-

family residential uses. The Ordinance prohibits transient commercial rentals of homes in neighborhoods zoned R-1. Transient commercial rentals are defined to mean rentals for less than 30 days. Ample accommodations for such vacation rentals exist in other parts of the City.

The Ordinance's restrictions are a direct reflection of the policy in Carmel's General Plan to protect the City's residential core from encroachment by visitor-oriented uses. The Ordinance applies to all single-family properties in the R-1 Zoning District. No single-family properties within that district are excluded. None is subject to greater or lesser restrictions on short-term occupancies.

Although the Petitioners did not raise any takings claim before the trial court, the Court of Appeal considered the Ordinance's relationship to its goal of enhancing and maintaining the residential character of the R-1 Zoning District and found that relationship or nexus to be legally sufficient.

Petitioners do not claim that the Ordinance deprives them of all economic use of their property, involves a physical invasion of their property, or singles them out to bear a burden that should be borne by the public as a whole. Accordingly, their Petition does not substantiate their claim that the Ordinance effects a taking of their property.

The second question of the Petition argues that the Court of Appeal decision grants municipalities excessive authority to delineate between permissible residential and impermissible commercial uses. However, this claim rests entirely on alleged state law interpretations of the terms "commercial" and "residential."

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEAL'S DECISION IN UPHOLDING THE ORDINANCE IS CONSISTENT WITH THE DECISIONS OF THIS COURT

The rational basis test that has been the accepted standard for review of zoning ordinances since this Court's decision in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926). California courts have consistently adhered to this standard. *See, e.g., Associated Home Builders etc., Inc. v. City of Livermore*, 18 Cal. 3d 582, 604-605, 135 Cal. Rptr. 41, 557 P.2d 473 (1976).

Petitioners now ask this Court to overrule *Euclid* and the 66 years of subsequent case law by imposing a higher standard of judicial review. Their circular reasoning is as follows: *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) requires the use of heightened judicial scrutiny in regulatory takings cases. Petitioners have claimed that the Ordinance's zoning restrictions constitute a regulatory taking, thus heightened scrutiny is required despite the absence of any substantiation in the Petition that the Ordinance has taken anything from Petitioners.

If the mere allegation of a regulatory taking were sufficient to trigger heightened judicial scrutiny, there would be no further place for the rational basis test accepted by the courts as the general standard in zoning cases. However, one reads *Nollan* and its progeny in vain for any indication that *Euclid* has been overruled.

This Court recently clarified the scope of the *Nollan* decision in *Yee v. City of Escondido*, 60 U.S.L.W. 4301 (U.S.

April 1, 1992) (No. 90-1947). Where the government *physically* encroaches on private property, the takings clause generally requires compensation. Where the government merely regulates use, a takings claim is raised only where the purpose of a regulation or the extent to which it deprives the owner of the economic benefit of property suggests that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. *Id.* at 4302.[1] Petitioners have not contended they are so burdened nor would such a contention be plausible: The Ordinance applies equally to all single-family properties within the R-1 District and Petitioners share the benefit and burden of its restrictions with their neighbors.[2]

Petitioners' suggestion that *Nollan* changed the level of scrutiny applicable to takings is inconsistent with both *Nollan* and *Nollan*'s interpretation in every Circuit. *See, e.g., Nollan, supra,* 483 U.S. at 835, 839; *Commercial Builders v. City of Sacramento,* 941 F.2d 872, 873-4 (9th Cir. 1991),

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[1] The *Yee* decision also emphasized that a regulatory takings claim requires a complex factual assessment of the purposes and effects of government action. Petitioners' failure to present their takings claim at the trial level necessarily hamstrings this Court in determining if a taking has occurred.

[2] The distinction between a zoning case and a takings case was described in Justice Renquist's dissenting opinion in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 139-140 (1978). In a zoning case, a prospective use of a piece of property is prohibited by restrictions on all property owners in the zoning district, for the common benefit of one another. A taking occurs if the restriction imposes an affirmative burden on a landowner for the benefit of the public. The Ordinance imposes no such burden.

and the cases cited therein. However, the appropriate standard of review is not relevant in this case because the Petitioners do not have a takings claim. Given the absence of any taking, this case falls squarely within the long line of this Court's opinions regarding public welfare zoning ordinances. It is settled that such ordinances are evaluated by the rational basis test. *See, e.g., Berman v. Parker,* 348 U.S. 26, 32-33 (1954); *Village of Belle Terre v. Boraas,* 416 U.S. 1, 7 (1974).

Lastly, it should be noted that the Ordinance was upheld because the Court of Appeal found that (i) the government has a legitimate interest in preserving residential character; *and* (ii) residential character is threatened by the conversion of homes in residential areas to short-term rentals occupied by a stream of vacationing tenants. This reasoning demonstrates that the court, in fact, found that a close and substantial relationship exists between the Ordinance and its stated goals, consistent with the level of scrutiny requested by Petitioners, and beyond the "sufficient nexus" required by *Yee.* 60 U.S.L.W. at 4304.

II. PETITIONERS' ATTACK ON THE ORDINANCE'S DISTINCTION BETWEEN COMMERCIAL AND RESIDENTIAL USES DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION

The Ordinance was adopted by Respondent City in order to protect the residential character of the R-1 District from encroachment by commercial, visitor-serving uses.

The police power of California cities includes a broad zoning authority. *See Associated Home Builders, supra,* 18 Cal. 3d at 604. Under the police power, cities may distinguish between commercial and residential uses. *See County of Butte v. Bach,* 172 Cal. App. 3d 848, 865, 218 Cal. Rptr. 613 (1985). The Federal Constitution allows the exercise of this line-drawing authority to protect the charm, spiritual and family values and "blessings of quiet seclusion" of residential neighborhoods so long as the lines drawn are reasonable and not arbitrary. *Village of Belle Terre v. Boraas,* 416 U.S. 1, 6, 8, 9 (1974), citing *Berman v. Parker,* 348 U.S. 26 (1954). *See also Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 129 (1978).

In tacit acknowledgment of Carmel's broad zoning power under the decisions of this Court, Petitioners do not cite any federal cases in support of their suggestion that Carmel has overstepped its powers in delineating between commercial and residential uses. Petitioners instead argue that the Ordinance is contrary to a settled definition of "commercial use of residential property" under *state* law. However, it is axiomatic that this Court is without jurisdiction to review claims based on state law. *New York Central & Hudson River Railroad Company v. City of New York,* 186 U.S. 269, 272-273 (1902).

In any event, the fallacy of Petitioners' attack is demonstrated by the very cases cited in the Petition. In both *City of Beverly Hills v. Brady,* 34 Cal. 2d 854, 215 P.2d 460 (1950) and *Sechrist v. Municipal Court,* 64 Cal. App. 3d 737, 134 Cal. Rptr. 733 (1976), the courts showed great deference to the cities' zoning powers. Neither case endorsed fixed definitions of "commercial" and "residential," but construed those terms according to the purposes

intended to be served by the zoning ordinance. *See also County of Butte, supra,* 172 Cal. App. 3d at 865. "[E]ven a semblance of commercial activity, incidental to the use of residential property . . . may be an excludable use of residential property if it might affect the 'residential character' of the neighborhood." *Sechrist, supra,* 64 Cal. App. 3d at 746.

Petitioners' claims that the Ordinance's distinctions are arbitrary shows a blatant disregard for the planning and zoning laws of the State of California. The Ordinance directly reflects a policy in Respondent City's General Plan mandating the preservation of permanent residential housing against the expansion of visitor-oriented commercial uses, including short-term rentals. A city's zoning ordinance must be consistent with its adopted general plan. *Lesher Communications, Inc. v. City of Walnut Creek,* 52 Cal. 3d 531, 536, 277 Cal. Rptr. 1, 802 P.2d 317 (1990). Far from being arbitrary, the Ordinance's distinction between commercial and residential uses reflects the principles laid down for the guidance of all municipal land use decisions in the General Plan, the City's "constitution for development." *See Citizens of Goleta Valley v. Board of Supervisors,* 52 Cal. 3d 553, 570, 276 Cal. Rptr. 410, 801 P.2d 1161 (1990).

CONCLUSION

The Petition utterly fails to set forth the basis for a takings claim or to demonstrate any deviation by the Court of Appeal from the decisions of this Court. Accordingly, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: April 22, 1992

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